2006 WL 6036953 (Mich.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Michigan.
Oakland County

Leon PEDELL, M.D., Plaintiff,
v.
HEARTLAND HEALTH CARE CENTER GEORGIAN BLOOMFIELD, INC;
Hcrmanor Care Services, Inc; Letty Azar; Kevin O'connor, Defendants.

No. 05-068289-CK.
April 28, 2006.

Plaitiff's Reply to Motion for Summary Disposition

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NOW COMES Plaintiff herein, LEON PEDELL, M.D. and for his Reply to Motion for Summary Disposition states as follows:

INTRODUCTION

This lawsuit involves the recruitment, employment and summary firing of Dr. Leon Pedell from his position as an attending physician and Medical Director of the Georgian Bloomfield Nursing Home. In the latter half of 2004, Dr. Pedell was recruited by Georgian Bloomfield to join its staff with the understanding that he would be afforded a patient population sufficient to earn a substantial living, in return for which he was going to be named the Medical Director of the nursing center and he was going to be involved in instituting a new medical plan in order to resolve the woeful deficiency report that the nursing home had received in its Michigan State Survey in the latter part of 2004. [Exhibit A] Essentially, Dr. Pedell was to be in charge from a medical perspective of cleaning up problems. Unfortunately for Dr. Pedell, two significant things happened shortly after his arrival at Georgian Bloomfield:

1. The administrator that had recruited him moved on to a new position in Virginia and the replacement administrator, an under-trained and over-stressed social worker could not cope with the added responsibilities of the administrator responsibility; and

2. Dr. Pedell learned that the institution had no genuine interest, under the direction of this new administrator, in finding a remedy to the health care survey problems identified by the State of Michigan. In fact, the new administrator quickly undertook a course of action in which she:

a. fired the Director of Nursing Education;

b. fired the Director of Infection Control;

c. forced the resignation of the Director of Nursing;

d. summarily fired Dr. Pedell from both his position as Medical Director and his position as an attending physician; and

e. summarily fired Dr. Cheryl Lerchin, the Physical Medicine and Rehabilitation Specialist.

As the reader will note from the balance of the explanation in this brief, the only motivation that prompts activity at Georgian Bloomfield is unmitigated greed. The **financial** bottom line is handsomely rewarded by bonuses and incentive pay to irresponsible administrators. Qualified personnel, like the Director of Nursing, the Director of Nursing Education, the Director of Physical Medicine, and the Medical Director (Dr. Pedell) who are genuinely concerned about the quality of patient care were disposed of with impunity during 2005.

The net effect of this behavior was that the State of Michigan survey which, in 2004, resulted in 38 pages of noted deficiencies and poor patient care (Exhibit A), swelled to a 58 page report by the State of Michigan (Exhibit B), with even more serious deficiencies than the preceding year. Nonetheless, the administrator who the Director of Nursing, the Director of Nursing Education, the Director of Physical Medicine, the Medical Director [and others] was rewarded with a bonus for the poor quality of patient care because the revenue and profits of Georgian Bloomfield swelled. (Exhibit F, Deposition Neumann). ***All of this action is done at the expense and medical jeopardy of the patient population.***

LEGAL BASIS FOR DR. PEDELL'S CAUSE OF ACTION

This litigation is being pursued on five theories of liability:

I. The Michigan Whistleblower's Protection Act;

II. Breach of Contract (both his contract as Medical Director and his Agreement with regard to status as attending physician);

III. Invasion of Privacy;

IV. Business defamation; and

V. Tortious interference with business expectancy.

HCR Manor Care is the parent company for Georgian Bloomfield. The parent company reports on its website that it is a tremendous profit-making opportunity for its shareholders. For the first nine months of 2005, HCR Manor Care reported $149,000,000 in profit. For the full calendar year of 2005, HCR Manor Care reported $165,000,000 in profit. (Exhibit M)

At the same time it was boasting of these record-setting profits, Georgian Bloomfield was earning profits at the expense of its patient care responsibilities and its patient population. At the same time Georgian Bloomfield cleaned house with regard to any of the medical personnel that were actually interested in furnishing quality care to the patient population, Georgian Bloomfield earned a profit in excess of $1,000,000. [Exhibit F; Deposition Linda Neumann; page 65, lines 16-19.]

During Dr. Pedell's brief tenure as Medical Director, Defendant Azar engaged in the following misconduct, resulting in poor patient care, and always citing “budgetary restraints” as the reason for her patient-adverse decisions:
• Refused to fund the purchase of an adequate number of thermometers and pulse oximeters; [Exhibit G, Deposition Shamsuddoha]

• Refused to allow the Director of Nursing Education to retain printed copies of the patient care manual for access by the CENA personnel; [Exhibit G; Deposition Shamsuddoha page 21, lines 11-17]

• Refused to allow the Director of Nursing Education (a woman who was also assigned responsibility as the director of Infection Control, although she had never previously served in that position anywhere), to attend a seminar dealing with infection control issues;

• Refused to institute a procedure for keeping track of laboratory study requests and laboratory study results; [Exhibit D; Deposition Azar, page 100 lines 22-25, page 101 lines 1-25, page 102 lines 1-6 and Exhibit Q; Deposition Davis, page 38 lines 6-23.]

• Refused to authorize the purchase of additional computers so that each nurse, at each nursing station, would have access to information regarding laboratory results; [Exhibit Q; Deposition Davis]

• Refused to authorize the purchase of computer equipment at each nursing station so that each nurse would have access to the patient care manual which HCR Manor Care maintains on line at its website; [Exhibit Q; Deposition Davis, page 32 lines 16-23 and Exhibit G.; Deposition Shamsuddoha, page 21 lines 11-25, page 22 lines 1-16]

• Permitted CENAs (nurse aides) to report to the floor when they were newly hired and had not yet completed their TB studies and essential documentation of their personal medical health; [Exhibit G; Deposition Shamsuddoha, page 50 lines 5- 20]

• Refused to allocate maintenance personnel to clean up the shower equipment which was badly rusted and identified by the Director of Nursing Education as a potential infection and slip and fall hazard for the patient population; [Exhibit G; Deposition Shamsuddoha, page 25 lines 9-21, page 26 lines 4-11];

• Inadequately interviewed applicants for positions of CENA (Certified Nurse Assistant) resulting in the employment of several people who had been prosecuted at another nursing home for provocative photographs obtained by posing with a deceased patient; [Exhibit C; Deposition Pedell]

• Hired a nurse supervisor despite the fact that the background check of the nurse in question (Kelly Carpenter) identified the fact that she had previously been suspended for abuse of narcotics (an action which then resulted in a narcotics investigation in March 2006 involving the same nurse who, once again, was accused of drug abuse involving patient medications);

• In a brief 60-90 day period, the Georgian Bloomfield Administrator:

o Fired the newly appointed director of nursing education and director of infection control;

o Processed the resignation of the newly appointed director of nursing because that nurse refused to fire the director of nurse education, citing the lack of sound reasons to do so;

o Refused Dr. Pedell's request for implementation of a log book procedure to keep track of laboratory requests and laboratory results;

o Promoted an unqualified individual to the position of Director of Nursing;

o Allowed the Director of Nursing (Davis) to continue a practice which was sanctioned by Georgian Bloomfield involving over-medication of the patients and unnecessary psychiatric consultations;

o Fired Dr. Pedell on the day that he was scheduled to present his first Quarterly Report as Medical Director to a team of individuals, including representatives from the home office of HCR Manor Care.

o Fired a clerical person (Jessica Parrot) for failing to fulfill her clerical responsibility, when Ms. Parrot reported to the administration that the reason she was falling behind in her clerical work was the fact that she could not simply listen to the moaning, plaintive cries of the patients, and the constant room call buzzers which the CENAs routinely ignored.

o Fired Dr. Cheryl Lerchin (PM&R Specialist).

The corporate parent has not instituted a method for supervision of the Georgian Bloomfield Administrators day-to-day decisions. No one conducts exit interviews of employees that resign and/or are fired. No one monitors the frequency with which personnel changes take place. [Exhibit F; Deposition Neumann page 25 lines 5-13]

Indeed, Linda Neumann who is the HCR Manor Care regional supervisor has testified that the only reports she receives with any regularity from Georgian Bloomfield are **financial** documents. This daily report tells her the patient census, the accounts receivable, the revenue forecast for the near term, and the projections of profit. Not a single report is required from the Georgian Bloomfield staff to the regional director that includes any documentation of patient well being, whatsoever.

HCR Manor Care has supervisory responsibility for Georgian Bloomfield. On the day that Dr. Pedell was fired, a representative of the office of General Counsel, Mr. O'Connor, attended and participated in presenting Dr. Pedell with his termination letter. Despite the fact that he had drafted the contract for the Medical Director position, Mr. O'Connor:
• Did not know that Dr. Pedell was scheduled to present his Quarterly Report;

• Did not know that the administrator had postponed the meeting at which Dr. Pedell was slated to furnish his Quarterly Report to personnel that included a nursing representative from the Toledo HCR Manor Care office;

• Did not know that Dr. Pedell had been vociferously objecting to the over medication of patients and the abusive practice of ordering unnecessary psychiatric consultations for several months;

• Did not know that Dr. Pedell had a direct encounter with Nurse Davis regarding the impropriety of the practice of ordering psychiatric consultations without physician order;

● Never asked Dr. Pedell for a copy of his Quarterly Report;

• Never asked Dr. Pedell for an exit interview or any discussion regarding patient care issues;

• Never left the administrative wing of the building, and has never personally toured any of the patient care sections of the building;

● Made no evaluative decision regarding whether or not Letty Azar's reasons for terminating Dr. Pedell bore any merit.

It should be noted that O'Connor has been named as an individual Defendant in this case because he knew of and personally interfered with Dr. Pedell's economic expectancies, on multiple levels, in derogation of his duties and responsibilities as an employee of HCR Manor Care. [1]

RECRUITMENT OF DR. LEON PEDELL

Dr. Pedell is a Board Certified Internist. Amongst attorneys who are familiar with medical malpractice litigation in the Southeast corner of Michigan, he is well known for his activity as an expert witness in support of the medical profession. He is held in high regard by other physicians. He devotes his time and attention to the specialty of "**elder** care medicine". He has, from time

to time, been an outspoken critic of procedures and practices at local institutions that required corrective measures in order to ensure the safety and appropriate treatment of patient population. This has been true while he was on staff at Beaumont Hospital (where he still remains on the staff), and has been true at other nursing homes (Woodward Hills). He is devoted to the quality of patient care and enjoys a favorable reputation for that attribute.

It is remarkable how much time the Defendants spend in their briefing in the effort to be sarcastic, cynical, and to discredit Dr. Pedell's credentials as a geriatrician. Before hiring him as the Medical Director at Georgian Bloomfield, Dr. Pedell had been retained by Georgian Bloomfield, HCR Manor Care, and Mr. Eller on a variety of medical-legal matters.
1. In March of 2003, Dr. Pedell was selected and served as a geriatrician expert witness on behalf of Georgian Bloomfield, working with the Kitch Drutchas law firm, with respect to the Mary Phillips case (See attached Exhibit R);

2. In May of 2003, Dr. Pedell was retained as an expert geriatrician in a case involving HCR Manor Care-Heartland Home Health Care, and Plaintiff Albert Rogers by defense counsel, Gary Eller, as a geriatrician expert in a medical-legal case; (Exhibit S)

3. Mr. Eller has relied upon Mr. Pedell's services as a geriatrician and solicited his personal, hands-on, care of one of Mr. Eller's elderly family members.

It is in this context that one must appreciate the effort to denigrate Dr. Pedell's credentials in order to make his complaints about the severe problems at Georgian Bloomfield, which resulted in his ouster as the Medical Director, seem trivial rather than important.

Indeed, Dr. Pedell was actively recruited by Sean Pressman, the former administrator of Georgian Bloomfield, because Mr. Pressman was familiar with Dr. Pedell's credentials, the high quality of his practice, and his sincere interest in taking care of **elderly** patients in the nursing home setting. [Exhibit I, Deposition Pressman page 11 lines 18-25, page 12 lines 1- 25]

At the time of recruitment, Dr. Pedell was seeking an opportunity to treat nursing home patients on a regular basis and simultaneously proved himself to be instrumental in modifying a facility that required quality nursing care considerations. When Dr. Pedell was recruited, it was understood that he would not be bringing to the Georgian Bloomfield Nursing Home a patient population. Rather, the nursing home needed to expand its physician staff and needed to have the ability to refer patients to a physician, like Dr. Pedell, under circumstances where they would not otherwise be under the direct care of a physician. This requirement has to do with Federal and State guidelines for the nursing home patient population being routinely evaluated by physicians and the necessity for emergency intervention.

Mr. Pressman made a commitment that the patient populations would be assigned to Dr. Pedell at a rate that would allow him to earn a reasonable living. [2] Mr. Pressman also knew that the facility had received a woeful report from the State of Michigan and that the current Medical Director was not doing the job adequately. Dr. Pedell was recruited with the expectation and the commitment that he would be nominated to the position of Medical Director, assuming that his service as an attending physician met with approval of the Georgian Bloomfield staff. ***Indeed, everyone states that Dr. Pedell was not fired for any reason having to do with the quality of his medical care; he has been routinely praised for his attentiveness to the patients, his availability to the nursing personnel, and his genuine concern for quality medical care being delivered to this patient population.*** [Exhibits D, E and F (Depositions Azar, O'Connor, Neumann, respectfully]]

Early in 2005, Mr. Pressman decided to leave Georgian Bloomfield and seek new employment in the State of Virginia. At the time, his assistant administrator was Letty Azar. [3] Shortly after Mr. Pressman's departure, a contract was offered to Dr. Pedell to become the Medical Director.

The Medical Director contract called for compensation to Dr. Pedell in the amount of $1,700 per month. The contract did not specify a term of months or years that the position would be fulfilled, nor a termination date for the contract. There was an expectation that Dr. Pedell's services in this capacity would be indefinite.

Acting in good faith upon his addition to the staff, Dr. Pedell did not seek staff privileges at any other hospitals or nursing centers, was not actively engaged in the practice of medicine elsewhere, and was devoting himself full time to Georgian Bloomfield. In fact, the contract required him to be available 7 days a week; 24 hours a day for emergency contact and to see *all* patients at Georgian Bloomfield, not just those assigned to him.

This relationship is not a traditional doctor-patient relationship. Dr. Pedell was not maintaining an outside office practice and then sending his patients to the nursing home. Rather, the nursing home maintained that all of the patients are the sole responsibility and are solely under the care of the Georgian Bloomfield Nursing Home. [Exhibits D, E and F (Depositions Azar, O'Connor, Neumann, respectfully.]

Therefore, the nursing home maintains that it has the right and responsibility to supervise, direct, and govern the care that is furnished to the patient population in the nursing home. Similarly, the nursing home maintains in the contract with the medical director that the nursing home has the right to *hjre, fire, govern, direct* and *control* the medical director's activities. (Exhibit O; Medical Director Agreement)

TERMINATION

On the very day that Dr. Pedell was scheduled to furnish his first Medical Director Report to the Quality Assurance Committee at Georgian Bloomfield, which included a representative from HCR Manor Care (the home office), Dr. Pedell was fired. The letter is actually dated two days before the date it was delivered. Dr. Pedell was told that he could not see the patients assigned to him, he was told that he could not return, and he was summarily dismissed. [4] Azar was concerned about publication by Dr. Pedell of his concerns, involving unauthorized orders for psychiatric consultation and the related Medicaid fraud, about which Dr. Pedell and Azar had disagreed. Obviously, no one at Georgian Bloomfield was interested in Dr. Pedell's quarterly report.

PHONY REASONS FOR FIRING

Azar has testified that there were three reasons why Dr. Pedell was terminated. (Her testimony is in conflict with the regional supervisor, Linda Neumann, and the general counsel, Mr. O'Connor, both of whom are in conflict with each other on salient facts.)

The three sham reasons for firing will be discussed here, before the genuine reasons for Dr. Pedell's dismissal will be reviewed.

According to Azar, “there were incidents between Dr. Pedell and employees of Heartland Georgian Bloomfield that had raised concerns”;

These three items included:
1. “... a phone call he had placed to a terminated employee joking, teasing, about why her job duties weren't being carried out that day. He phoned her at home after she had been terminated.” (The Jessica Parrott incident.)

2. A confrontation with an MDS nurse (the Dee Falconer incident) in which Dr. Pedell “raised his voice and told her to shut up”.

3. “There was an interaction between Dr. Pedell and one of our nurses that was beyond the scope of his practice as a Medical Director, and it was in relation to her wages.” (*The Roberta Burkes incident*)

It is noteworthy that when queried in detail regarding the reasons for termination, Azar, O'Connor and Neumann state with absolute certainty that none of the reasons for firing Dr. Pedell from his position as Medical Director have anything to do with a criticism or critique of the quality of care that he was furnishing to the patient population.

DEBUNKING THE PHONY REASONS FOR FIRING

1. The Jessica Parrott incident.

Jessica Parrott, R.N. is the sister of Roberta Burkes. Parrott was employed as a ward clerk at the Georgian Bloomfield Nursing home. She was fired by Letty Azar on a charge that she had failed to fulfill her obligations as a ward clerk.

In fact, Jessica Parrott has affirmed that she lost her position as a ward clerk because she found the behavior of the CENAs to be intolerable. [Deposition Parrott] When the patients would ring their buzzers, hang around the unit clerk desk, or lay in their beds crying for help and assistance, Jessica Parrott (a charitable woman) could not remain disinterested and disengage herself from the patient pleas for help. She, therefore, neglected her duties as a clerk and spent some of her time answering to patient needs. Azar fired her for this reason.

The telephone call (which no one bothered to investigate) was not initiated by Dr. Pedell. Before she was fired, Dr. Pedell and Jessica Parrott had been trying to coordinate laboratory report processing, together, in an effort to improve the practices at Georgian Bloomfield. After she had been fired, Jessica Parrott telephoned her sister, Roberta Burkes at work. Roberta Burkes handed Dr. Pedell the telephone, told him that Jessica wanted to speak with him, and he answered that request. A brief conversation ensued in which Dr. Pedell agreed that he would write a letter of recommendation for Jessica Parrott in the continuation of her studies, which she was going to pursue, possibly in the nursing profession. [Exhibit J, Deposition Burkes]

Jessica Parrott was not in the least bit offended by this conversation. Letty Azar never bothered to inquire of Jessica Parrott if she was offended by the conversation. Azar's testimony at present is that speaking to a former employee (apparently an abrogation of all of the Constitutional Rights that the rest of the United States' population theoretically enjoys) is a firing offense.[5] [Exhibit L, Deposition Parrott; Exhibit J, Deposition Burkes]

2. The Dee Falconer incident.

Dee Falconer was employed as an MDS Nurse. She was fired for insubordination shortly after Dr. Pedell was terminated.

Everyone who worked with Dee Falconer has indicated that she was belligerent, aggressive, verbally abusive, over-bearing and could not accept criticism. [Deposition Mackie; Deposition Burkes] On the date in question, Dee Falconer initiated a conversation with Dr. Pedell in which she was commenting on one of his assigned patients. In the presence of Patricia Land, Falconer began yelling at Dr. Pedell in a tirade that lasted for more than 5 minutes. She was abusive, profane, and aggressive. After trying to calm her down and attempting to deal with the situation diplomatically, he ultimately told her to “shut up”.

Apparently this is a firing offense for a physician at Georgian Bloomfield. Ultimately, the belligerent behavior was a firing offense for Dee Falconer.

3. The Roberta Burkes incident.

Roberta Burkes is a nurse employed at Georgian Bloomfield. After Azar had fired the Director of Nursing and the Director of Medical Education and the Director of Infection Control, Roberta Burkes mentioned in passing to Dr. Pedell that she was troubled by the amount of additional duties she had been asked to assume. She was also concerned about the fact that her

compensation did not increase with the additional duties, that she was having difficulty completing the multiple tasks assigned to her, and that she was frustrated. Dr. **Pedell's offense was his suggestion to her that she needed to bring these issues to the attention of the Administrator if she was not receiving adequate reaction from the newly appointed Director of Nursing (Deborah Davis).** [Exhibit J, Deposition Burkes]

Apparently it is a firing offense at Georgian Bloomfield to counsel one employee that she should discuss issues of concern with the Administrator.

THE REAL REASON WHY DR. PEDELL WAS FIRED

Shortly after his arrival at Georgian Bloomfield, Dr. Pedell became actively involved in trying to remedy the problems that had been identified by the State of Michigan Survey. In fact, he had been asked to undertake this effort by Mr. Pressman.

He identified significant deficiencies at Georgian Bloomfield involving staffing, training, and availability of information. Nurses Aides:

Multiple witnesses have testified, and will affirm, that the Georgian Bloomfield Nursing Center makes considerable profit by hiring under qualified, under trained, low-paid personnel as the primary care givers for the patients. [6]

The Nurses Aides behave in a manner that demonstrates lack of supervision. They do not routinely attend continuing medical education training (Exhibits A & B). They are not properly trained at the inception of their employment (Exhibit G, Deposition Shamsuddoha; Exhibit H, Deposition Rowe). The Nurses Aides do not follow established procedure for maintaining patient care in avoidance of infection. (Exhibit G, Deposition Shamsuddoha; Exhibit H, Deposition Rowe) They gather in assembly areas at the hospital, engage in idle chit chat, engage in gossip, avoid responding to the patient call buttons, and treat the patients with disdain.

Dr. Pedell encountered hygiene problems because of an unenforced proscription against long fingernails. Many of the aides and some of the nurses could not wear gloves, or could not use them without puncturing the gloves, during their care of residents because of their long fingernails. Dr. Pedell became alarmed about a serious outbreak of Norwalk Virus Gastroenteritis that caused severe nausea, vomiting and diarrhea in a large number of the residents.

Georgian Bloomfield suffered from recurrent infection problems involving rampant problems affecting not only the patients but the staff. After the firing of Deborah Shamsuddoha as the infection control nurse, there was a two month vacancy in that position. [7] Most importantly, Dr. Pedell became involved in a dispute with the newly-appointed Director of Nurses (Deborah Davis) on June 14, 2005. A patient assigned to him (name redacted for HIPPA purposes) was dropped by an aide while being transferred. Dr. Pedell interviewed and examined the patient the next day after being notified of the incident the following morning by the nurse manager. The patient was alert and appropriate. The patient remembered the incident. She knew that it had happened on the second shift, she knew the name of the aide who dropped her, and the name of the aide who came into help. Dr. Pedell was concerned that this incident had not been properly written up on an incident report, no help had been obtained for the patient during the second shift, nor on the third shift. When Dr. Pedell made an issue of the fact that the nurse aides had failed to properly document the patient's problem and to secure help for her (she ultimately required surgical correction of a fracture), the Director of Nurses, Davis, tried to intimate that the patient was disoriented, mistaken, and that the incident did not happen. For a period of time, Nurse Davis attempted to actually deny that the patient had been dropped, a specific HIPPA violation. Dr. Pedell informed her (Davis) and Azar that the failure to properly document the incident was disingenuous and unethical. [8] His concern about the absence of proper documentation for this patient was genuine. This started a cascade of events with Deborah Davis, a Director of Nursing who felt threatened by Dr. Pedell's involvement. [9]

UNAUTHORIZED VERBAL ORDER

Problems with Nurse Davis came to a boiling point early in July 2005 when the Director of Nurses (Davis) wrote on a patient chart what she claimed was a "verbal order" from Dr. Pedell. This was a verbal order for a psychiatric consultation. It was recorded in the patient's chart without calling Dr. Pedell, and without any documentation whatsoever regarding the nurse perception as to why the patient required a psychiatric consultation and no explanation for the failure to actually speak to Dr. Pedell about the purported Order.

Davis has now admitted during her testimony that *this was a violation of the Standard of Care for nurses.* [10] She should not have written a verbal order; that act alone is contrary to state law and violates her license requirements. She also acknowledges a violation of the standard of care in the failure to properly document the events which gave rise to the so-called verbal order. These issues are not merely passing concerns. Davis and Dr. Pedell had previously engaged in conversations about the misuse of psychiatric consultations in the nursing home setting, which was endemic at Georgian Bloomfield. Medicare Fraud:

One of the problems with nursing home care, across the country, is that the low paid nursing staff (not as well qualified as they should be by either training or experience) want to make their own jobs easier by keeping the patients in a stupor. They do this by medication routines that keep the patients dull from overlapping, frequent, routine medications. Dr. Pedell refuses to do this and insists that the nurses take an active role in monitoring the patients, actually seeing the patients to determine when and whether they need pain medication, and then administering the medication when it benefits the patient, not when it benefits the nurse. Deborah Shamsuddoha and Terry Rowe witnessed too many nurses at Georgian Bloomfield sitting around, playing cards and gossiping, activity which they accomplish by overmedicating the patients. Moreover, the psychiatric or psychological consultation is a method for allowing the nurses to characterize the patients as "demented" or "crazy" and therefore justifying abusive behavior, ignoring the patients, overmedicating them, and otherwise engaging in substandard practice. Nurse Davis testified that this is the "real" reason that Dr. Pedell was fired. [11] [Exhibit Q, Deposition Davis, pages 52-53]. He refused to go along with the format of issuing psychiatric consultations on the majority of patients. Two things resulted from this practice:

1. Patients are required to stay in the institution longer; and

2. The institution successfully bills for the services of the psychiatrist and the additional days required for keeping the patients in the institution.

Dr. Pedell brought this problem with Davis to the attention of Letty Azar. He was told that there would be a review, that her action would be corrected, and that the problem would be addressed. Davis, for her part, told Dr. Pedell that she would continue to write these orders as she saw fit, did not feel compelled to speak with doctors before writing orders that she characterized as "verbal orders" and was unapologetic.

Dr. Pedell made it clear when the response was inadequate that he regarded this as a significant event, that this was a practice outside the scope of nursing care, that this was a violation of the standard of care, and that he was in the process of notifying the State of Michigan Department of Health to inquire regarding licensing requirements. *The State of Michigan personnel advised Dr. Pedell to lodge an official complaint, which he did, and which he advised both Davis and Azar.* (Exhibit N) *Absence of Laboratory Reports:*

Securing laboratory results at Georgian Bloomfield was a significant problem. William Beaumont reference lab was the only laboratory that the physicians at Georgian Bloomfield were allowed to utilize. Despite the fact that the patient population is usually in the range of 180 people, in 4 separate floors/wings there was only a single computer at which laboratory results could be accessed. Dr. Pedell tried to improve this situation by requesting that the nursing staff be assigned to maintain a log book for laboratory requests and laboratory results, as well as a record of when and whether the attending physician was notified of laboratory results. He also made it known that the number of computers and printers was inadequate.

At various times he was told by Azar and Davis that they would institute a logbook procedure that was available on the HCR Manor Care website, that they would assign nurses to this task, and that they would secure additional computers. As of the deposition of Davis taken in March 2006, none of the log book practices have been instituted and, indeed, the available computer access is still limited. *In other words, absolutely nothing has been done to improve the requirement that laboratory results be furnished to the attending physicians.* Dr. Pedell was legitimately concerned that this oversight and inadequacy was resulting in poor patient care, lack of medication, improper medication, and required return of people from the nursing home to Beaumont Hospital, and other hospitals.

Dr. Pedell had also been outspoken through the months of May, June and July, 2005 regarding the poor quality of information being obtained at the time patients were admitted to the nursing home. Patients were being neglected, they were being transferred without proper medication, they were being transferred without proper physician orders, and no one was attempting to coordinate this activity. A single nurse had been assigned this task, but Nurse Deborah Powers had gone on to maternity leave and, in her absence, no one had replaced her in this position. As a consequence, admission procedures were frequently noncompliant both with standard of care and with the requirements of the State of Michigan. [Exhibit J, Deposition Burkes]

Additionally, there were ongoing problems with inadequate nurse education, inadequate CENA updated and continuing education, as well as inadequate staffing for respiratory and tracheotomy patients. [Exhibit G; Deposition Shamsuddoha]

Dr. Pedell is not a shrinking violet. He was routinely making these problems known to Letty Azar in his effort to obtain improved services for the patients. Dr. Pedell's position has always been that quality of care delivery to the patient should not suffer because of **financial** restraints, particularly in an instituting making the type of profit that HCR Manor Care/Georgian Bloomfield generated.

AZAR'S QUALIFICATIONS AS AN ADMINISTRATOR

It is painfully obvious that the motivating force at HCR Manor Care is avarice. The profits reported on the website, and the profitability of Georgian Bloomfield, reflection excess of $1 million dollars in annual profit. In the selection of Letty Azar as administrator of this facility, one can see the lack of genuine interest in sponsoring quality medical care for the patients.

Letty Azar is a 32year old social worker. She does not have a degree in nursing; she does not have a degree in medical care giving; she does not have a master's degree in public health; she does not have a master's degree in management or business. She had never served before as an administrator and has no training other than that which has been provided to her by her employer. She is an insecure manager of people who fires anyone who chooses to disagree with her opinion. She is married to an administrator who also works for Heartland (contrary to the proclaimed anti-nepotism policy of HCR Manor Care). Before her appointment to the position of Administrator at Georgian Bloomfield, she worked as an assistant administrator at another HCR Manor Care facility, Georgian East.

Azar repeatedly lied to Dr. Pedell about her plans to remedy problems at Georgian Bloomfield (as the December 2005 State of Michigan clearly reflects). She unabashedly admits having lied to Dr. Pedell about the events of July 20, 2005. On July 18, 2005, Letty Azar told Dr. Pedell that she had scheduled a conference with Dr. Pedell, Nurse Davis, and Letty Azar which was to be conducted on July 20th, just prior to the previously scheduled Quality Assurance Meeting. She indicated to Dr. Pedell that she was going to deal affirmatively with Davis' misconduct (now admitted violation of the standard of nursing care).

On July 20th, she abruptly moved back the Quality Assurance Meeting from the scheduled time of 11:00 a.m. until 2:00 p.m. When she told Dr. Pedell the reason for doing this, she lied. Dr. Pedell, innocently, spoke with the Pharmacy Representative from Toledo (with whom he had been working to improve the pharmacy distribution within the nursing home) and relayed his understanding that the Quality Assurance Meeting had been moved back a few hours. The Toledo representative complained she might not have the ability to stay until 2:00 p.m. Then, Azar invited Dr. Pedell to a meeting with O'Connor, handed him a

backdated letter terminating his contract, and ordered him to leave the building with his personal effects. She refused to allow Dr. Pedell to deliver his Quarterly Assessment Review as required by his contract. She forbade him to attend to an acutely ill patient.

I. ENTITLEMENT TO MICHIGAN WHISTLEBLOWERS' PROTECTION ACT RECOVERY [MCL 15.361(1)(a)]

For purposes of the protections afforded by the Michigan Whistleblowers' Protection Act, MCL 15.361(1)(a), Dr. Pedell is an "employee" afforded protected status.

a. Protection under the Whistleblowers' Protection Act Dr. Pedell has a sustainable claim under the WPA. The WPA was enacted in 1980 and states in pertinent part that:
"An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action." MCL 15.362

The United States District Court for the Eastern District of Michigan discussed the WPA in *Deneau v. Manor Care, Inc.,* 219 F. Supp.2d 855 (2002). In Deneau, plaintiff was an at-will employee of Heartland Health Care [12] and in that capacity was responsible for reporting the current status of the facility's patients to the State of Michigan regulatory authorities. Plaintiff alleges she saw several patients suffering from significant weight loss. She then entered this information into the facility's database, which is then subsequently submitted to the State of Michigan regulatory authorities. Plaintiff alleged that defendant terminated plaintiff as a result of her actions.

The court articulated that a prima facie case for WPA actions consists of a showing that: (1) plaintiff was engaged in protected activity as defined by the WPA; (2) plaintiff was discharged; and (3) a causal connection existed between the protected activity and the discharge. The court further stated some additional steps that the plaintiff must show include; (1) that the defendant received objective notice of the intent to engage in the protected activity; (2) if the plaintiff establishes the prima facie case then the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse action; (3) the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext of discrimination if the defendant carries the burden; and (4) the plaintiff may meet the burden of showing pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence.

DISCUSSION

In this case, Dr. Pedell was clearly engaged in protected activity, and has demonstrated by clear and convincing evidence that he had reported suspected violation of law (i.e. misuse of psychiatric consultation practices and unauthorized orders written by the Director of Nursing) to a public body. Dr. Pedell in his capacity as medical director brought to the attention of the administrator (Azar) his concern about these improprieties in nursing care and his intention to either make sure they were corrected or, alternatively, reported to the State of Michigan Department of Nursing for licensure review. He also demanded that the Director of Nursing should be instructed to modify procedures to control over medication of patient and the unnecessary and unauthorized psychiatric consultations.

(b) Independent Contractor vs. Employee

In order to determine whether an individual qualifies for the employee protection afforded by the Workers Protection Act, the Courts employ the "economic reality" test. In Chilingirian v. City of Fraser, 194 Mich. App. 65, 486 N.W.2d 347 (1992), plaintiff was terminated from his City Attorney position. Plaintiff then attempted to sustain a cause of action against his former employer under the Whistleblowers' Protection Act (WPA). Defendant contended that plaintiff should not be entitled to protection under the WPA, because he was not an employee of the city, but rather an independent contractor. The issue before the court was whether or not plaintiff was an independent contractor, and therefore not entitled to the protection afforded by the WPA. The court held that the proper test to determine whether one is an independent contractor or an employee is the economic reality test. This test looks to the totality of the circumstances surrounding the work performed, including: (1) control of a worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward accomplishment of a common goal. The court also stated that no single factor is controlling, and all the factors are viewed as a whole. The court concluded that plaintiff did not meet the standards set forth in the above test, and therefore found he was an independent contractor. The court based this conclusion on multiple facts including; (1) the city was only one of the law firm's clients; (2) the law firm provided legal services to a number of other clients; (3) plaintiff maintained his own office not on the defendant's premises, with his own support staff; (4) plaintiff was not involved in the city's pension program and the city did not pay plaintiffs salary; (5) plaintiff was not subject to the city with respect to the method of his work. The court further stated that because plaintiff was an independent contractor it is impossible for him to support his claim under the WPA and summary disnosition was nroner

Then in *Chilingirian v. City of Fraser*, 200 Mich. App. 198, 504 N.W.2d 1, (1993) (On Remand), (Chilingirian 2) the court emphasized, "by previously holding the plaintiff was an independent contractor and not an employee of the city, we did not mean to imply that an independent contractor could never be considered an employee as defined in the WPA." The court has not dismissed the possibility of examining an independent contractor under the economic reality test usually reserved for employees.

The economic reality test has been applied in an unpublished Michigan Court of Appeals decision, which discusses the effect of the Chilingirian decision. In Rakowski v. Sarb, 269 Mich App 619 (2006), the court discussed as a preliminary matter, whether defendant was an employee of plaintiff. The trial court applied the economic reality test to determine defendant's employment status. The issue before the court in this preliminary matter was whether under the economic reality test was defendant an employee of plaintiff. The court applied the economic reality test from Chilingirian and determined plaintiff was defendant's employer. This determination was based on the following facts, including; (1) defendant worked a regular full-time schedule of forty hours a week; (2) plaintiff controlled defendant's day-to-day duties, and the manner in which he performed his job; (3) plaintiff retained the right to fire without cause and generally evaluated defendant's performance during the time he worked; and (4) defendant's work was an integral part of accomplishing the plaintiffs goals.

In this case, Dr. Pedell would be considered an "employee" of Georgian as defined in MCL 15.361(1)(a). This conclusion is reached by application of the economic reality test to the facts of this case. Georgian Bloomfield had control over Dr. Pedell's actions in multiple ways including; (1) Dr. Pedell did not furnish medical care to patients at other facilities; (2) Dr. Pedell was to consult with and advise the administrator and Director of Nursing on the medically related aspects of patient care, ***which was ultimately under the control of the administrative personnel of Georgian Bloomfield (as affirmatively demonstrated by Azar's decision to preclude Dr. Pedell from seeing his critically-ill patient on the day he was summarily fired);*** (3) Dr. Pedell was to review the qualifications and experience of each physician employed at Georgian, but the center had the right to disapprove any individual who was to render services at the center; and (4) Dr. Pedell had to report to the administrator of the center and furnish verbal and/or written reports to the administrator or director of nursing upon conclusion of each visit and he was required to be available 7 days a week, 24 hours a day. Georgian paid Dr. Pedell a salary in the amount of $1,700.00 per month, satisfying the payment of wages element of the economic reality test. *Agreement. Page 13.* Georgian had the right to terminate Dr. Pedell' s employment at the center, which satisfies the right to hire, fire and discipline element of the test. *Agreement. Page 2*, VII. Finally, Dr. Pedell's duties were an integral part of the employer's business toward the accomplishment of a common goal. This is evidenced by Dr. Pedell's requirement to arrange for a qualified physician acceptable to the center, to perform his obligations during any absence, vacation, or other periods of unavailability. *Agreement. Page 2,I(A)(9).*

c. Economic Reality Test.

One can also look to Workers' Compensation cases to determine how and why the "economic reality test" is applied to determine whether an employment relationship exists for purposes of statutory protection, similar to the Whistleblowers" Protection Act. In Clark v United Technologies Automotive, Inc., 459 Mich. 681 (1999), the Michigan Supreme Court has stated:
"The economic-reality test was embraced by this Court as a more realistic attempt to define the employer-employee relationship through a "balancing of all the relevant factors in each case," than the rigid control test. [FN6] *[Renfroe v. Higgins Rack Coating &Mfg. Co., 17 Mich.App.* 259, 265, 169 N.W.2d 326 (1969)]. Given the increasingly complicated relationships developing into today's business and economic marketplaces anything other than a totality of the circumstances test would be an insufficient guide by which to evaluate the employee-employer relationship.

"FN6. Kidder, supra at 31-35, 564 N.W.2d 872, contains an excellent discussion of the history of the economic realities test and its predecessor "control" test. See also Wells, supra at 646-647, 364 N.W.2d 670. "Although the totality of the circumstances are considered, in applying the economic realities test, the courts generally consider the following four factors "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Askew v. Macomber*, 398 Mich. 212, 217-218, 247 N.W.2d 288 (1976); see also Kidder, supra at 34-35, 564 N.W.2d 872; Wells, supra at 648-650, 364 N.W.2d 670. 689 No one factor is controlling. Farrell, supra at 276, 330 N.W.2d 397."

Indeed, in the same case, the Court determined that there are circumstances where there is a factual question to be determined by the trier of fact as to whether or not an individual is an employee as opposed to an independent contractor.

> "In light of the numerous conflicting inferences that may reasonably be drawn from the known facts, including who hired plaintiff, who paid plaintiff, and who had the right to supervise, discipline, and fire plaintiff, we conclude that the issue whether Lincoln was a coemployer of plaintiff for purposes of the exclusive remedy provision is for the trier of fact. Therefore, we reverse the Court of Appeals and trial court and remand for further proceedings consistent with this opinion."

Further, in Nichol v Billot, 406 Mich. 284 (1979), the Supreme Court articulated not only the applicability of the economic reality test, but the necessity for that test to be determined on factual review by the trier of fact.
"In conclusion, we find that the application of the control test in a tort action where Respondeat superior liability is not involved is inappropriate. We hold that the economic reality test, in its consideration of factors beyond the control element, achieves a more realistic determination of the independent contractor/employee question in cases where the affirmative defense of co-employee immunity under s 827 (1) is utilized."

"It is a basic proposition of law that determination of disputed issues of fact is peculiarly the jury's providence. *Wight v. H.G. Christman Co.*, 244 Mich. 208, 211, 221 N.W. 314 (1928). Even where the evidentiary facts are undisputed, it is improper to decide the matter as one of law if a jury could draw conflicting inferences from the evidentiary facts and thereby reach differing conclusions as to ultimate facts. *See Simerka v Pridemore*, 380 Mich. 250, 156 N.W. 2d 509 (1968)."

DISCUSSION:

It is clear from the sham explanation furnished by Letty Azar, that Dr. Pedell was fired because he was unable and unwilling to cooperate in the **financial exploitation** of the Georgian Bloomfield patient population. He was not willing to allow his name to be attached to unauthorized orders for psychiatric consultation and, when he voiced his complaints about this issue and his intention to make this issue known to the State of Michigan authorities, he was discharged from employment. This is the classic

circumstance under which the Whistleblower Protection Act is designed to afford the discharged individual reimbursement for the economic losses sustained as a consequence of the abusive behavior of the employer. Simply said, Dr. Pedell refused to "go along" with the psychiatric consults, the over medication, and the resulting Medicare fraud. He made this known early in his tenure as Medical Director. He reinforced it when he confronted Deborah Davis about her preparation of the unauthorized order.

II. BREACH OF CONTRACT: WRITTEN AGREEMENT

Defendants postulate that simply because the contract nominating Dr. Pedell as the Medical Director recites that it is "at will" that the contract can be broken as the nursing home sees fit.

Defendants make a similar argument for their contention that they can decide to terminate Dr. Pedell's privileges as an attending physician seeing patients at the nursing facility.

It is well established that, under circumstances where the Whistleblowers Protection Act applies, an act which prohibits employers from discharging employees, the claim of the public policy exception to the employment at will doctrine is intended to preserve the contractual relationship. *See, Dudewicz v Norris-Schmid,* 443 Mich 68 (1993). There are multiple cases which confirm that there is, indeed, a "public policy" exception to the general rule that employment at will may be terminated at any time for any reason. *Covell v Spengler,* 141 Mich App 76 (1985).

Under consideration here, this court must review both the written contract (Medical Director Agreement) and the oral commitment regarding service as an attending physician, with long term expectations regarding assignment of patients.

Under Michigan Law, in both of these agreements, there is an unwritten expectation and reliance upon an implied duty of "good faith" as a term of the contract. Contrary to the Defendants' position, imposition of the statute of frauds is not a definitive analysis of the issues and principles that are at work here. In Jim-Bob, Inc. v Mehling, 178 Mich App 71, 443 N.W.2d 451 (1989), the Court of Appeals favorably cited language from multiple cases referencing the Supreme Court:

> "Certainly nothing in the language of the statute requires adherence to the strict "nothing in parol" rule suggested in *Gedvick [v. Hill,* 333 Mich. 689, 53 N.W.2d 583 (1952)]. The statute does not require the entire contract to be written; a "note or memorandum" of the full contract will suffice. *See Kerner v Hughes Tool Co,* 56 Cal App 3d 924; 128 Cal Rptr 839 (1976). Perhaps the "nothing in parol" notion resulted from the combining of the statute of frauds with the so-called "parol evidence rule," or rule against contradicting integrated writings. *See NAG Enterprises, Inc v All State Industries, Inc,* 407 Mich 407; 285 NW2d 770 (1979), reh den 407 Mich 1164 (1980); *Union Oil Co of California v Newton,* 397 Mich 486; 245 NW2d 11 (1976). In any event, the "nothing in parol" approach to the statute of frauds has been so dishonored in this Court that it has lost any claim to legitimacy. *Wozniak v Kuszinski,* 352 Mich 431; 90 NW2d 456 (1958); *Farah vNickola,* 352 Mich 513; 90 NW2d 464 (1958); *Cramer v Ballard,* 315 Mich 496; 24 NW2d 80 (1946); *Goslin v Goslin,* 369 Mich 372; 120 NW2d 242 (1963); *Duke v Miller,* 355 Mich 540; 94NW2d 819 (1959); *Goldberg v Mitchell,* 318 Mich 281; 28 NW2d 118 (1947); *Randazzo [v. Kroenke,* 373 Mich. 61, 127 N.W.2d 880 (1964)]. The foregoing cases establish the principle that extrinsic evidence may be used to supplement, but not contradict, the terms of the written agreement. In the absence of extrinsic supplemental evidence, the court may infer that the parties intended a "reasonable" or "good faith" term as part of the contract.

DISCUSSION

Defendants cannot claim any "good faith" basis for the termination. Dr. Pedell conformed in every respect with regard to the requirements of his contract and his separate oral agreement. Dr. Pedell entered into a written agreement regarding his service

as the Medical Director, premised upon the prior oral commitments that were made by Mr. Pressman on behalf of Georgian Bloomfield and HCR Manor Care. Those agreements were intertwined. Both parties acted in reliance upon those commitments. To his detriment, Dr. Pedell fulfilled his end of the bargain.

Defendant are not entitled to discharge the attending physician status of Dr. Pedell "at will" without being subject to Breach of Contract remedies.

In *Feyz v Mercy Memorial Hospital,* 264 Mich App 699 (2005), the Court of Appeals has noted:
"...a private hospital ... is subject to the same potential civil liability of any private corporation that violates an employment statute, breaches a contract, or the like..."

"Rather, private hospitals are subject to the same breach of contract claims as any other private corporation. Therefore, if the issue is again raised, the trial court must determine whether a breach of contract claim may be based on a corporation's violation of its own bylaws under Michigan law. If the answer to that question is "yes," and if plaintiff has adequately pleaded such a claim, the claim is viable despite the nonreviewability doctrine. But plaintiff's claim does not lack viability merely because the defendant is a private hospital rather than some other private corporation."

III. INVASION OF PRIVACY

Introduction:

Plaintiff's invasion of privacy claim is premised upon the fact that Mr. O'Connor communicated with at least one other person, Mr. Hessburgh, Dr. Pedell's termination from his contract as Medical Director and Attending Physician at Georgian Bloomfield.

In view of Dr. Pedell's standing in the medical-legal community, disclosure of this information is, indeed, embarrassing, potentially detrimental to Dr. Pedell's role as an expert witness, and is information that is of no legitimate concern to the public. [*See, Beaumont v Brown,* 401 Mich 80 (1977), *Doe v Mills,* 212 Mich App 73 (1995)].

The Defendants have refused to permit communication with Mr. Hessburgh regarding these issues, claiming attorney client privilege (Deposition of O'Connor). Nonetheless, in defense of the claims, the Defendants have now waived the attorney client privilege and have attached to their Motion for Summary Disposition previously unauthorized disclosures between O'Connor (Attorney at Law) and Azar (a corporate officer).

Plaintiff has filed and will be arguing a Motion authorizing the re-deposition of Mr. O'Connor based upon the waiver of attorney-client privilege which Defendants have now determined to utilize specific documents, unilaterally, waiving the attorney-client privilege. It is patently unfair to seek dismissal of the invasion of privacy count, without permitting investigation because of the purported attorney-client privilege and then, when Defendants think it suits their need waive that privilege

Wherefore, before this Count is decided, Plaintiff respectfully is requesting additional opportunity for discovery, as described in the companion motion.

IV. BUSINESS DEFAMATION

The Michigan Court of Appeals recognizes business defamation as any false statement that might injure someone's business interests and deter third persons from dealing with the business. Business defamation not only applies to corporate entities but also to individuals. *Michigan Microtech, Inc. v Federated Publications, Inc.,* 187 Mich 178 (1991); *Heritage Optical Center, Inc. v Levine,* 137 Mich App 793 (1984).

The business defamation in the instant case involves the communication by O'Connor, Azar and the corporate entities through Neumann to Mr. Hessburgh, and others, indicating that Dr. Pedell was terminated from his position as Medical Director. The use of the term “terminated” implies adverse conduct on the part of Dr. Pedell in his professional capacity which would justify termination of his appointment as Medical Director. Michigan Courts recognize a cause of action for defamation by implication (See, for example, *Everitt v Parking Acres, Inc.,* 2005 WL 624736 (Mich App), an unpublished decision in which defamation by implication is described.) The fact that Dr. Pedell was “terminated”, and that this information was communicated to others, under circumstances where there is absolutely no indication of any quality of care issues or patient care issues that would justify his discharge is, by implication, harmful to his reputation as an experienced geriatrician. This is, indeed, what Neumann, Azar, and O'Connor understood would be the natural consequences and logical sequella of the termination. (Exhibit F, Deposition Neumann) The fact that Dr. Pedell now claims that he has been defamed comes as no surprise to the Defendants; it is the intended effect. In the alternative, if the Defendants did not intend to cause harm to Dr. Pedell's reputation in the medical-legal community and in the practice of geriatrics, requesting his resignation from his attending physician privileges could have and should have been accomplished. Defendants should not be permitted to escape responsibility for the result that they intended under these egregious circumstances.

V. TORTIOUS INTERFRENCE WITH BUSINESS EXPECTANCY

Tortious interference with a business relationship or expectancy is a well-recognized doctrine which afford Plaintiff a remedy for unreasonable interference with his economic expectations arising out of specific relationships. In this regard see *Jim-Bob, Inc. vMehling,* 178 Mich App 71(1989) and M Civ JI 125.01-126.04.

There are multiple economic expectancies at work in this case. They include:
A. Attending physician opportunities not only at Georgian Bloomfield but at other nursing care institutions in the community;

B. The attending physician opportunities at Georgian Bloomfield which, according to the Defendants, were not governed by the Medical Director contract; and

C. Medical-legal activities as an expert witness, of which these defendants were uniquely familiar.

Linda Neumann (the HCR Manor Care supervisor ultimately responsible for the decision to fire Dr. Pedell) testified that she was aware that termination would have a negative impact on Dr. Pedell's application for future activities and privileges at other nursing homes where he might seek to establish a patient caseload. Nonetheless, without a good faith basis and, indeed, without an investigation, the corporation and the individual Defendants (O'Connor, Azar) actively sought to terminate these multiple economic expectancies.

It would appear that O'Connor's motives differ from Azar's. Defendant Azar actively wanted to rid herself of any employees, like Dr. Pedell, who conflicted with her management style in which, at all times, the **financial** bottom line was the primary consideration. Defendants make the mistake of treating all of the named Defendants as though they have similar standing before the Law. This is absolutely not true. Plaintiff has specifically alleged allegations against O'Connor individual and Azar individually because of their differing roles, differing responsibilities, differing motives. Moreover, these individuals are responsible both for their agency relationship to the principal (HCR Manor Care) but also for their individual actions in securing Dr. Pedell's termination.

Our Court of Appeals has impliedly stated that a cause of action may be pursued by a Plaintiff against fellow employees for interference with the business expectancy of continued employment with the employer. In this regard, see *Everton v Williams and Ballard Power,* (Court of Appeals No. 264554; 2006 WL 787927)

Further, the Everton case cites *Healthcall II* where the court will find an excellent evaluation of the elements of tortious inference with a business relationship or expectancy. *Healthcall II*, 268 Mich App 83 (2005). Those elements are:
A. The existence of a valid business relationship or business expectancy that is not necessarily predicated on an enforceable contract;

B. Knowledge of the relationship or expectancy on the part of the Defendant interferer;

C. An intentional interference by the Defendant inducing or causing a breach or a termination of the relationship or expectancy; and

D. Resulting damage to the party whose relationship or expectancy was disrupted.

DAMAGES

Dr. Pedell's damage claim is premised upon multiple losses including:
1. Termination of his Employment Agreement as an Attending Physician. This was an oral agreement under the terms of which he was motivated to join the staff at Georgian Bloomfield and he anticipated $150,000 in annual income. Dr. Pedell has been unable to secure attending staff privileges at any other location, primarily because of the abrupt nature of his termination and his honesty in disclosing to all nursing homes where he has been seeking attending physician privileges.

2. As Medical Director, Dr. Pedell was paid $1,700 per month. That income has not been replaced because he cannot secure attending staff privileges nor a position as Medical Director.

3. Dr. Pedell has, for a number of years, earned significant income resulting from his service as a medical-legal expert. Under the current tort reform qualifications for expert testimony, there is approximately a “two year tail” during which Dr. Pedell will remain eligible to serve as an expert witness in medical-legal context and, thereafter, he will be disqualified under the applicable statutes from service as an expert witness. (MCLA 600.2169, et seq.) Dr. Pedell will be losing approximately $150,000 in annual income, commencing in July 2007. He is 55 years of age. Dr. Pedell had contemplated service as an expert witness through the balance of his active work as a geriatric specialist in the medical-legal community.

4. The Whistleblower's Protection Act (MCLA 15.364) provides that the Court may order payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any commutation of these remedies. The Court may also award costs of litigation, including reasonable attorney fees and witness fees.

SUMMARY

This case presents a variety of complicated and subtle facts which, when presented to a jury, will no doubt result in a substantial verdict for Plaintiff. Summary Disposition should be denied.

Dated: April 28, 2006

Footnotes

1 DDr. Pedell, Director of Nursing Education Deborah Shamshuddoha, Director of Nursing Teny Rowe, and Unit Clerk Jessica Parrot all lost their jobs during the Spring of 2005 as a consequence of the administration's refusal to address patient care issues and to expend the funds necessary for patient care improvement. In December 2005 Georgian Bloomfield again received its annual assessment

from the State of Michigan inspectors. On this occasion, the number of citations had increased, demonstrating that the administration at Georgian Bloomfield not only cannot address problem issues at the facility but will not address problem issues at the facility. Rather, the administration heeds strict budgetary constraints and attempts to ignore and/or bury any of the positive steps suggested by those nurses and physicians that have worked in general health care, not limited to the nursing care industry, where patient care and patient responsibility is the primary consideration Rather, Georgian Bloomfield heeds the instructions of HCR Manor Care and focuses on the economic bottom line. Letty Azar's bonuses are directly tied to her ability to manage the budget Remarkably, despite identification of these numerous issues, problems, and frequent firings of qualified personnel, Letty Azar remains in her position as the Administrator at Georgian Bloomfield.

2 Mr. Pressman had promised a patient population that would be equivalent to 25-35 patients at all times, which roughly equilibrates to $150,000 per year in annual revenue.

3 On the day that Mr. Pressman announced his resignation, with the appropriate 30 day notice, he was marched out of the building by security and was not permitted to return.

4 One of Dr. Pedell's assigned patients was critically ill. He was refused access to this patient and was told that Georgian Bloomfield would be responsible for securing a physician to see the patient In fact, the patient was not seen by a physician within 24 hours and was seen by a physician's assistant, an individual who never previously had any contact with the patient.

5 Indeed, if that was a criteria for firing people, then Dr. Pedell, who has been contacted by numerous nurses remaining on staff at Georgian Bloomfield, could offer a laundry list of people that should be fired, including Regional Supervisor Linda Neumann and General Counsel Kevin O'Connor, who solicited his input after he left the facility under termination.

6 Indeed, there is testimony that in order to satisfy State guidelines regarding nursing-patient ratio, Georgian Bloomfield has routinely instructed its nurses to falsify the count, calling people who are assigned to administrative tasks as “on hands” personnel in order to satisfy state requirements. [Deposition Shamsuddoha]

7. Indeed, during 2005, after Dr. Pedell was fired, Davis has testified that this position remained vacant for numerous months or was occasionally covered by Davis, who was wearing multiple hats. Despite Shamsuddoha's firing, Davis

never
attended
any
infection
control
seminars,
training
sessions,
nor
instituted
any
procedures.

8 At Letty Azar's request, shortly after his appointment as medical director, Dr. Pedell went through more than 100 incident reports that had been left uncompleted by the prior medical director and updated the reports, as required by the State of Michigan.

9 It has been reported by several people that after Terry Rowe was forcibly resigned, Deborah Davis was introduced to the Nurse Aides by Letty Azar as “Finally, we have a Director of Nursing with whom we can get along.” The clear implication was that the Nurse Aides would not be challenged by the Director of Nursing or by the Director of Medical Education (Davis).

10 Davis has now been forced to testify, during cross examination, that she violated the standard of care. Although she claims that the patient was suicidal, she wrote no report She made no call to the doctor regarding the suicidal ideation. She never documented the contention that the patient was suicidal. However, the way this nursing home is run, Davis admitted the violation of the standard of care, but has not been disciplined for her action. Instead she received a bonus for her role in ordering unauthorized psychiatric consultations, a **financial** windfall and Medicaid scam perpetuated by Georgian Bloomfield.

11 At page 52 of her deposition, Davis has testified as follows:

Q. How soon before Dr. Pedell was fired did you know he was going to be fired?
A. I don't recall the length of time.
Q. Pardon me?
A. I don't recall.
Q. You did know before he was going to be fired?
A. Yes.
Q. More than a day?
A. I didn't know when.
Q. Were you told by Letty Azar or by Linda Neumann?
A. By Letty.
Q. And when she said he was being fired for performance, what did that mean?
A. I think on his role as a physician, bringing in other disciplines into the role of his patients, he didn't want to go ahead and do that.
Bringing other disciplines into his role as a phvsician. What does that mean?
A. Bringing in other, using like psychologists, psychiatrists in with his patients.
Q. So what LettyAzar told you is that she wanted to have the ability with the patients at Georgian Bloomfield to have psychologists and psychiatrists more directly involved in care and Dr. Pedell wasn't going along with that?
A. Yes.
Q. Was that a conversation you had with her after Dr. Pedell had objected to your writing a verbal order without his authorization?
A. No.
Q. She told you that before?
A. Yes.

12 Ironically, a subdivision of the parent defendant involved here.